No. 82-309

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY K. SMITH, HELEN FOLEY and JOSEPH SHANAHAN,

Appellants,

vs.

P. PAUL RICCI, President, State Board of Education and FRED G. BURKE, Commissioner of Education,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES, PRESIDENT OF STATE BOARD OF EDUCATION AND COMMISSIONER OF EDUCATION, TO DISMISS OR TO AFFIRM

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellees, P. Paul Ricci, President, State Board of Education and Fred G. Burke, Commissioner of Education,
Richard J. Hughes Justice Complex
CN 112,
Trenton, New Jersey 08625.
(609) 292-8577

MARY ANN BURGESS,
Assistant Attorney General,
Of Counsel and On the Brief.

JAYNEE LAVECCHIA,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-9611

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MOTION OF APPELLEES, PRESIDENT OF STATE BOARD OF EDUCATION AND COMMISSIONER OF EDUCATION, TO DISMISS OR TO AFFIRM

Appellees, the President of the State Board of Education and the State Commissioner of Education, respectfully move to dismiss this appeal or to affirm the judgment of the Supreme Court of New Jersey, pursuant to Rule 16(1)(b), on the grounds that the appeal does not present a substantial federal question and, in part, rests on an ade-

quate non-federal basis and, pursuant to Rule 16(1)(d), on the grounds that this appeal does not raise any issues of special importance and that the judgment below is totally consistent with federal precedent and is so obviously correct as to warrant no further review by this Court.

Statutory and Regulatory Provisions Involved

This matter directly involves two statutes which are part of the education laws of the State of New Jersey. N.J.S.A. 18A:35-5 requires each local school district to conduct, as part of its curriculum, "courses in health, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments" while N.J.S.A. 18A:35-4.7 provides:

> "Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom."

N.J.A.C. 6:29-7.1, the rule adopted by the State Board of Education implementing N.J.S.A. 18A:35-5 and consistent with the requirements of N.J.S.A. 18A:35-4.7, is set forth in Appendix B to the Jurisdictional Statement.

Counter-Statement of the Case

This appeal challenges the facial constitutionality of an administrative rule adopted by the New Jersey State Board of Education to govern programs of Family Life Education.

This rule has its origin in the Policy on Sex Education adopted by the State Board of Education in 1967. This policy recommended, but did not require, that each local board of education include a sex education program as part of its health curriculum. In 1979, the State Board appointed a Committee of its members to fully review the effectiveness of this policy.

The Family Life Committee determined that although the Policy on Sex Education had been in effect for twelve years, pupils in only 40% of the school districts had access to courses in family life or sex education. Statistics reviewed by the committee demonstrated that:

> "the number of teenage pregnancies continues to increase each year . . .
>
> • • •
>
> "in New Jersey in 1977, twelve thousand babies were born to girls between 15 and 19; 60% of these girls were unmarried;
>
> "of the teenagers who do become pregnant when in school, about 80% drop out and do not complete their education;
>
> "research studies continue to show that babies born to adolescent mothers are more apt to be premature and underweight; babies of low birth weight often suffer from a lag in development throughout their early years which affects their ability to learn in school;

> "the incidence of veneral disease in both males and females continues to rise." (Appellees' App. A at 4a to 5a).*

In the face of such alarming statistics, the Committee concluded that the optional nature of the Policy on Sex Education was no longer acceptable. It, therefore, recommended that (1) the study of family life be required as part of the sequential health education curriculum; (2) the State regulations provide for an excusal policy from sections of the curriculum dealing directly with sex eduaction based on parental grounds of conscience; (3) districts provide appropriate services to assist pregnant teenagers and teenage parents and (4) the Department of Education prepare, for consideration by the State Board, regulatory proposals to implement the Committee's recommendation (Appellees' App. A at 8a to 10a).

At its meeting of August 8, 1979, the State Board of Education accepted the Committee's report and adopted its recommendations. Following this action a proposed rule governing Family Life Education was drafted which rule was then subjected to a full year of intensive public scrutiny and spirited public debate. The broad range of comments received by the State Board, through extensive written submissions and detailed oral statements presented during four public hearings, resulted in modifications of the original proposal and accommodations to the legitimate concerns expressed by parents, educators and other interested citizens.

The rule, in its final form, defined "family life education" as:

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* As used herein, Appellees' App. A refers to the Appendix filed by appellees in support of the present Motion to Dismiss or to Affirm.

> ". . . instruction to develop an understanding of the physical, mental, emotional, social, economic, and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality, and reproduction, at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community." N.J.A.C. 6:29-7.1

Although the rule requires each local school district to include "family life education" among its curricula offerings, it permits each district to develop its own curriculum and to determine the grade level at which family life education will be introduced in the elementary school. The rule, also, requires that parents be actively involved in the curriculum development process. More importantly, each local district is to:

> ". . . establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his/her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom." N.J.A.C. 6:29-7.1(i).

This excusal provision reflects the specific requirements of chapter 428, laws of 1980, N.J.S.A. 18A:35-4.7 known as the "Parents Rights to Conscience Act." Finally, although each local district must adopt a policy "for the

development of a family life education program" by September, 1981; full implementation of this program need not be completed until September, 1983.

Pursuant to N.J. Ct. R. 2:2-3(a)(2), five named individuals, all citizens and taxpayers of New Jersey, challenged the rule governing Family Life Education principally on the grounds that it violated the religious freedom guaranteed by the First Amendment of the United States Constitution. While the matter was pending unheard in the Appellate Division, the Commissioner and State Board of Education, pursuant to N.J. Ct. R. 2:12-2, moved for direct certification before the Supreme Court of New Jersey so that the cloud of a constitutional challenge to this Statewide educational program could be expeditiously resolved. Direct certification was granted on September 3, 1981. *Smith* v. *Ricci*, 88 N.J. 471 (1981).

In a decision issued May 25, 1982, the Supreme Court of New Jersey upheld the validity of the State Board rule governing Family Life Education. *Smith* v. *Ricci*, 89 N.J. 514, 446 A.2d 501 (1982) (Appellants' App. A at 1a to 11a).* The Court initially rejected appellants' argument that the rule violated the Free Exercise Clause of the First Amendment finding this argument flawed in two ways.

> "First, the regulation, because of the excusal clause, does not inhibit the free exercise of religion. Second, to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause." *Smith* v. *Ricci*, 89 N.J. at 523 (Appellants' App. A at 8a to 9a).

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* As used herein, Appellants' App. A refers to the Appendix filed by Appellants with their Jurisdictional Statement.

The Court recognized that some pupils might find the exercise of the right to be excluded from the program of Family Life Education difficult. However, it correctly observed that the Constitution does not guarantee that the exercise of religion will be without difficulty. Indeed, the Supreme Court of New Jersey, in upholding the rule governing Family Life Education, followed the lead of this Court which has:

> ". . . repeatedly . . . upheld neutral laws of general applicability even though such laws have somehow burdened the exercise of some religions." *Smith* v. *Ricci*, 89 N.J. at 521 (Appellants' App. A at 7a).

Appellants also contended that the Family Life Education program violated the Establishment Clause of the First Amendment since it would inhibit all traditional religions to the point of establishing secularism as a religion. The Court below found this argument totally unpersuasive. It observed that "absolutely nothing in the regulation . . . gives even the slightest indication that the program favors a 'secular' view of its subject matter over a 'religious' one." *Smith* v. *Ricci*, 89 N.J. at 524 (Appellants' App. A at 9a). Since the rule is neither antagonistic toward religion nor supportive of non-religion, has a clearly secular purpose and does not foster excessive governmental entanglement with religion, the Court found that it passed constitutional muster under the tripartite test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and did not constitute an establishment of religion.

The Court below next considered appellants' argument that the State Board violated the Due Process Clause when it adopted the rule governing Family Life Education because the Board did not show a reasonable relationship

between the goals of the program and the means adopted to achieve those goals. Properly noting the heavy burden which appellants bear in challenging the reasonableness of administrative action, the Court found that they offered no evidence to meet that burden but only the "bare assertion" that no data existed which would prove that the program would have any impact on the societal ills it attacks. Indeed, in reviewing the voluminous record before it, the Court concluded that the record revealed:

> ". . . a sufficient factual basis for the Board's conclusion that the family life education program is a reasonable, desirable, and necessary method of dealing with readily identifiable educational and social problems. If the Board were required to prove the efficacy of each curricular program before implementing it, the Board's ability to operate would be severely and unnecessarily encumbered. No such proof is required."
>
> *Smith* v. *Ricci*, 89 N.J. at 525 (Appellants' App. A. at 11a).

Appellants' further arguments that the "process" followed by the State Board in adopting the rule was procedurally unsound and that the Legislature's grant of rulemaking power to the Board was illegal because it lacked adequate standards were found to be similarly lacking in merit.

Based upon the foregoing analysis, the Supreme Court of New Jersey sustained the validity of the State Board rule governing Family Life Education. On August 20, 1982, three of the appellants below filed a Notice of Appeal with the Supreme Court of New Jersey pursuant to 28 U.S.C. § 1257 (2) and thereafter filed a Jurisdictional Statement. The present motion to dismiss the ap-

peal or to affirm the judgment of the Supreme Court of New Jersey is submitted on behalf of the appellees, the President of the State Board of Education and the Commissioner of Education.

ARGUMENT

The judgment of the Supreme Court of New Jersey, upholding the validity of the rule governing family life education as a well reasoned educational decision of religious neutrality which appropriately accommodates the religious beliefs and practices of those within the public school system, should be affirmed since it is plainly correct or the present appeal should be dismissed since it fails to raise a substantial federal issue, does not present an issue of broad importance and does not conflict with federal precedent.

The rule challenged in the present appeal was adopted by the State Board of Education in furtherance of its unique responsibilities to assure the provision of a "thorough and efficient" system of free public education as mandated by the Education Clause of the New Jersey Constitution. N.J. Const. (1948) Art. VIII, § 4, ¶ 1. See N.J.S.A. 18A:7A-1 *et seq.* Recognizing the importance of family life education in preparing today's pupils to function "politically, economically and socially in a democratic society", the State Board adopted this rule which requires each local board of education to include programs in family life education among its curricula offerings. N.J.S.A. 18A:7A-4. However, sensitive to the right of parents to mold the moral and religious principles of their children and consonant with the legislative mandate contained in N.J.S.A. 18A:35-4.7, the rule provides

for excusal from those portions of family life education programs which may conflict with "conscience, or sincerely held moral or religious beliefs." N.J.A.C. 6:29-7.1(i). This rule, involving as it does the content of the public school curriculum, goes to the very heart of the educational process. Its adoption represents an educational judgment implicating a particularly high degree of expertise by those State officials responsible for the soundness of the public educational system.

This Court has long recognized that "public education in our Nation is committed to the control of state and local authorities," *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) and has "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). Most recently, this Court stated that:

> ". . . courts should not 'intervene in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts. *Epperson* v. *Arkansas*, 393 U.S. at 104, 89 S.Ct. at 270." *Board of Educ., Island Trees, etc.* v. *Pico*, —— U.S. ——, 102 S.Ct. 2799, 2807 (1982).

Appellants contend, however, that intervention by this Court is warranted in the present case because the rule governing Family Life Education, on its face, inhibits the Free Exercise Clause of the First Amendment. This challenge is mounted despite the absolute religious neutrality of the rule and the inclusion therein of an excusal provision which appropriately "accommodates" the religious beliefs and practices of those within the public school system. Indeed, it is the latter excusal provision

which is the focus of appellants' present "Free Exercise" challenge. It is their contention that the rule, which requires pupils to take certain action in order to be excused from certain segments of family life education, exposes the pupil to a subtle form of societal pressure which may influence him not to opt for excusal but to abandon religious beliefs.

It is well established that "a violation of the Free Exercise Clause is predicated on coercion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). That coercion, however, must be direct. Incidental burdens, such as the social pressure which may be attributable to the proper accommodation of free exercise values, clearly do not rise to the level of a constitutional violation. See *Gillette* v. *United States*, 401 U.S. 437, 453 (1971).

The decision of the Supreme Court of New Jersey, consistent with numerous decisions of this Court, properly recognized that religiously neutral laws of general applicability are constitutionally sound notwithstanding the potential for some incidental or indirect burdening of the exercise of some religions (Appellants' App. A at 7a). Indeed, this Court recently stated:

> "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs." *United States* v. *Lee*, —— U.S. ——, 102 S.Ct. 1051, 1057 (1982).

In the present case, the State's grant of excusal from those portions of family life education deemed objectionable represents an effort toward appropriate accommodation. Appellants, dissatisfied with that effort, demand elimination of the family life program altogether. However, there

"can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson* v. *Arkansas,* 393 U.S., at 106.

The decision of the Supreme Court of New Jersey is not singular. Rather, it is entirely consistent with several prior decisions of other state supreme courts and lower federal courts all upholding, in the face of First Amendment challenges, programs of family life or sex education. See *Cornwell* v. *State Board of Education,* 314 F.Supp. 340 (D. Md. 1969), aff'd 428 F.2d 471 (4th Cir. 1970), *cert.* den. 400 U.S. 942 (1972); *Hopkins* v. *Hamden Board of Education,* 29 Conn. Sup. 397, 289 A.2d 914 (Ct. Conn. Plea. 1971); *Citizens for Parental Rights* v. *San Mateo County Board of Education,* 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Cal. Ct. App. 1975), appeal dism. 425 U.S. 908 (1976), reh. den. 425 U.S. 1000 (1976); *Medeiros* v. *Kiyosaki,* 52 Ha. 436, 478 P.2d 314 (1970). Nor do appellants raise any novel arguments in support of the contention of unconstitutionality.

In *Citizens for Parental Rights* and *Medeiros,* the complaining parents unsuccessfully asserted, as do appellants herein, that utilization of the available excusal provision would indirectly constitute compulsion in violation of the free exercise of religion. *Citizens for Parental Rights, supra,* 51 Cal. App. 3d at 17-18, 124 Cal. Rptr. at 81-82; *Medeiros, supra,* 52 Ha. at 444, 478 P.2d at 318. In ruling upon the same argument raised in this case, the Court below correctly rejected appellants' theory, holding appellants' reliance upon *Abington School District* v. *Schempp, supra,* to be misplaced.

The decision in *Schempp* recognizes that impermissible indirect compulsion can exist when a school district un-

dertakes to impose religious values upon pupils by daily compulsory bible readings at the commencement of the school day. In that context, this Court ruled that simply permitting individual pupils to absent themselves from the exercises upon parental request did not save the school program from violating the Establishment Clause. *Schempp, supra,* 374 U.S. at 224-225. By continuing the religious exercise for nonobjecting pupils, the school district was not maintaining the wall between church and state contemplated by the Constitution and the excusal of objecting pupils could not alter that impermissible fact.

The case presently before this Court involves the reverse situation. A religiously neutral program is being conducted in the public schools of New Jersey which program appellants seek to eliminate since they disagree with its content. The educational program is not invalid merely because appellants assert that a burden, minimal at best, must be borne to utilize the excusal provisions designed for the accommodation of persons who, like themselves, prefer not to permit their children to participate in this religiously neutral educational program. Whatever minimal burden appellants must endure is clearly outweighed by the State's interest in continuing its salutory program of family life education which the State Supreme Court recognized as "a reasonable, desirable, and necessary method of dealing with readily identifiable educational and social problems." (Appellants' App. A at 11a). This Court has consistently adhered to the principle that:

> ". . . courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Wisconsin* v. *Yoder,* 406 U.S. 205, 235 (1972).

That principle should be applied to this case. The broad brush elimination of an entire school program deemed reasonable and necessary by both the head of the State education agency, N.J.S.A. 18A:4-10, and the State Supreme Court is unwarranted. Individual accommodation for pupils is provided for by both regulation and statute and is all that is required by the Free Exercise Clause. Plainly, this case presents no substantial federal issue involving the First Amendment which warrants further review by this Court.

Appellants also assert a violation of the Due Process Clause of the Fourteenth Amendment. In their briefs before the State Supreme Court appellants raised two distinct due process arguments which were considered and ruled upon by that tribunal. The first involved an alleged violation of the State Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* The Court below rejected this argument finding that the State Board of Education, in adopting the rule governing Family Life Education, comported with both the letter and spirit of the Administrative Procedure Act. The appellants raise this due process argument in the present appeal. Since this issue is purely a matter of State law, that portion of appellants' appeal pursuing this issue is not within this Court's appellate jurisdiction. 28 U.S.C. § 1257(2). See *Murdock* v. *Memphis,* 87 U.S. 590, 636 (1875). Accordingly, this issue is not sufficient to support the present appeal in the absence of a substantial federal question.

In their second due process argument, appellants contend that the rule governing Family Life Education violates the Fourteenth Amendment because it is arbitrary, capricious and an abuse of discretion. This aspect of the challenge appears to center on appellants' assertion that the State Board did not show a reasonable re-

lationship between the goals of the program and the means adopted to achieve those goals.*

The rule governing family life education was adopted by the State Board of Education in furtherance of its unique responsibilities to assure the adequacy of curricula offerings in the public schools. See N.J.S.A. 18A:7A-1 *et seq.* In adopting this rule, the Board concluded that Family Life Education is a necessary component of the public school curriculum which must be available to all pupils so that they will be prepared to function "politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4. The adoption of the rule followed careful study and full and sometimes painful debate at numerous public hearings. Admittedly, it is an educational judgment which has sparked healthy debate and which has produced both ardent support and determined opposition. Clearly, it is not for this Court to substitute its judgment for that of the State Board when "intelligent and conscientious men could differ" on the wisdom of its administrative action, *United Hunters Ass'n of N. J.* v. *Adams,* 36 N.J. 288, 292 (1962), and indeed, this Court has repeatedly declined to do so. See *Epperson* v. *Arkan-*

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*Even assuming that the regulation results in some incidental, indirect burdening of the free exercise of religion which might require application of the stricter test of "compelling State interest" to appellants' due process argument, see *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963), the rule governing Family Life Education would still pass scrutiny. Appellants have not established any significant infringement of their First Amendment right while the State Board has amply demonstrated that it acted well within its delegated authority and technical expertise in requiring that course in family life education be included among the curricula offerings of the public schools. The wealth of social science data and expert testimony presented during the public hearings on this rule overwhelmingly demonstrated the need for an organized State-wide program of family life education.

sas, supra. Accordingly, appellants' bald assertions of the unreasonableness of the regulation must be rejected in the face of the full record demonstrating the basis for the State Board of Education's determination of the necessity for the regulation and its concomitant decision to utilize adoption of the regulation as the means for addressing those needs.

The judgment of the Supreme Court of New Jersey, which upholds the validity of the rule governing Family Life Education as a well reasoned educational decision of religious neutrality which appropriately accommodates the religious beliefs and practices of those within the public school system, should, therefore, be affirmed by this Court since it is clearly correct or the appeal herein should be dismissed since it raises no substantial federal question, presents no issue of broad public importance and demontrates no conflict with federal precedent.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellees, P. Paul Ricci, President, State Board of Education and Fred G. Burke, Commissioner of Education,
By: MARY ANN BURGESS,
Assistant Attorney General.

MARY ANN BURGESS,
Assistant Attorney General,
Of Counsel and On the Brief.

JAYNEE LAVECCHIA,
Deputy Attorney General,
On the Brief.

Dated: October 8, 1982

[APPENDIX FOLLOWS]